

STATE OF WISCONSIN

IN CIRCUIT COURT

WASHBURN COUNTY

**LINDA K. FINE,
WASHBURN COUNTY HIGHWAY DEPT.,
Petitioners**

VS.

WISCONSIN DEPARTMENT OF ILHR,

Respondent.

**DECISION ON PETITION
JUDICIAL REVIEW
Case No. 97CV03**

The petitioners seek judicial review of the decision of Administrative Law Judge Robert Junceau's decision concerning the disallowance of additional costs in connection with remediation of ground water contamination and judicial review of the decision of the Wisconsin Department of Commerce which adopted the decision of the Administrative Law Judge. The Petition for Judicial Review was filed January 17, 1997. Briefs were filed by the Wisconsin Department of Commerce, the last one on June 20, 1997. The last brief of Owen Ayres and Associates, Inc. was filed June 30, 1997.

In 1992 the petitioners retained a consultant referred to hereinafter as (Ayres) to do remedial work following removal of an underground storage tank. Ayres secured competitive bids and its bid of approximately \$27,000 was selected and approved by the Department of Commerce. During its work, pursuant to its bid, Ayres discovered that to avoid contamination of ground water flowing from the pollutants on the job site, there would have to be the additional installation of monitoring wells and additional laboratory work. The petitioners authorized Ayres to complete their work, which was not originally contemplated without having that work competitively bid. The Department denied the claimed cost submitted by Ayres of \$7,752.50. The Administrative Law Judge affirmed the denial by the Department. The Department accepted and adopted the Findings and Decision of the Administrative Law Judge and the petitioners have filed their Petition for Judicial Review as above set forth.

Effective in January 1993, Section 101.143(4)(a) and (8)(a) Wis. Stats., established a petroleum environmental cleanup fund program. The rules relating to that program required that all commodity services, including monitoring wells constructed should be obtained through a competitive bid process as provided in Wisconsin Administrative code Section ILHR 47.33(1)(b)l.

In 1993 petitioners had Ayres conduct the remediation work following removal of an underground petroleum storage tank. The soil borings and related laboratory analysis which would be required were competitively bid in May 1993. The petitioners had monitoring wells installed and relative laboratory work performed, but the petitioners allowed Ayres to do that work with their own employees without securing competitive bids. The need for the installation of the monitoring wells and laboratory work was determined after Ayres had completed its work pursuant to the initial bid.

The majority of the briefs submitted to this Court seemed to be concerned with the issue of how much deference should be awarded to Department of Commerce as a State agency. The petitioners contend that no deference should be awarded because the agency had very little experience in administering the regulations adopted in 1993. The agency claimed deference because the agency was involved in the creation of the act and was well acquainted with the purpose of the act. This Court holds that the issue of deference to be afforded the agency is immaterial in this case because the decision is entirely controlled by section 47.33(l)(b)l of Wisconsin Administrative Code ILHR. This section affects change orders which this court concludes were involved in this case. The section referred to applies directly to change orders.

Petitioners and Ayres contend that the rules concerning the job only required bidding for the original scope of the work and that the bidding requirements did not apply to change orders and that new bids were not obtained for the monitoring well installation and laboratory costs.

The original bid was approximately \$25,000. No contingency provision was included in the bid submitted by Ayres. It was during the completion of the work contemplated in original bid that the water table was found to be contaminated by the spreading of the pollutant. Petitioners contend that the taking of bids at that time with reference to completing the project would cause costly delays, and the petitioners believed that the additional work to be done would be relatively inexpensive. As a matter of fact, the additional work done resulted in a bill of more than 25% of original bid. The petitioners argument seems reasonable in view of their concept of what the eventual costs would be. However, in a like situation, the additional cost might be far more, perhaps succeeding \$50,000. to \$100,000 and under those facts petitioners argument is seen to be fallacious.

Petitioners also contend that the denial of reimbursement is not statutory. However, the Court finds that the regulations cited above flow from the statute and the regulation clearly provides with reference to change orders that the owner or operator must provide a written account to the Department for any additional work to be performed and that failing to provide justification acceptable to the Department constitutes grounds for disallowing the additional costs.

Petitioners seem to argue that the regulation is unnecessary and is a poor one in that it results in substantial and costly delays, and that rule should be amended or modified. To do so is not the function of the Court on review. Petitioners further argue that the additional work was not foreseeable or contemplated in the original bid. The Administrative Law Judge found that the work was foreseeable because experience shows that the installation of monitoring wells are necessary in about one half of these types of projects. Ayres' own expert stated (transcript pages 24 and 25) that the contingency of needing monitoring wells occurs in approximately one half of the time. It appears from the transcript that one of the bidders did provide for the contingency that monitoring wells installation would require additional expenditures. The court concludes that the contingency was foreseeable and that the Findings of the Administrative Law Judge was reasonable.

The Court concludes that the regulation as to change orders is clear, concise, not ambiguous and is mandatory.

Subsection 4 of the regulation cited above as to change orders, provides:

If it is determined that the consulting services may not be completed within the original estimate, the owner or operator and the consultant shall provide a written account, to the department, of the additional work to be Performed in order to prove the need for additional funding. Failure to provide justification acceptable to the department shall constitute grounds for disallowing the additional costs...

The regulation is clear because the meaning is obvious to the ordinary reasonable and prudent person. There is no basis for ambiguity and none is argued by petitioners. The regulation is mandatory as indicated by use of the word "shall" in two places within this short regulation.

The regulations, as cited above, completely control the disposition of this review. The Decision of the- Administrative Law Judge and the adoption of that Decision by the Department of Commerce are affirmed. The Petition before the Court for Review is denied.

Dated this 29th day of July, 1997.

BY THE COURT:

Hon. Warren E. Winton
Circuit Court Judge